

13 August 2021

**Modification to DA16/1083, 21-25 Woodriff Street, Penrith  
Statement of Environmental Effects**

General Manager  
Penrith City Council

By Email:  
council@penrith.city

Our Ref: 21.052  
Your Ref: DA19/1083

I refer to the above application and advise we have been requested to assist with a Section 4.55 modification of the approved development. This submission is to be considered as a Statement of Environmental Effects for the application.

**1. Background**

Astina acquired the subject site from Penrith City Council with conditions that were incorporated into a jointly signed Deed. The Deed, amongst other things, requires Astina to operate the site as serviced apartments for a period of three years from the date of the Occupation Certificate, being 1 May 2021. In the event the use of the site changes within that time, a financial payment is required to be made to the Council. Once the three-year period passes (ie beyond 1 May 2024), there is no restriction relating to the property deal with Council on the use of the building.

DA16/1083 was approved by the Sydney West Planning Panel on 24 September 2018. The front page of the Notice of Determination describes the approval as follows – *Eight (8) Storey Serviced Apartment Building containing 58 Serviced Apartments, Related Facilities, Three (3) Ground Floor Commercial Tenancies and Two (2) levels of Basement Car Parking.*

I note the following two conditions that were imposed:

Condition 11 – *Strata Subdivision of the building or part of the building to be used as serviced apartments is not permitted.*

Condition 12 – *No approval is expressed or implied by this consent for the development to operate as a residential flat building.*

Subsequently, a modification was lodged with Council requesting condition 11 be removed. Modification DA16/1083.02 was approved under delegated authority on 13 February 2019 removing condition 11, but adding (without consent of the proponent) condition 86, which was worded as follows:

*Prior to the issue of a Construction Certificate (excluding early works), a restriction/positive covenant is to be endorsed by Council that provides for the following:*

*"The development is to be managed by a single entity as a 'serviced apartment' development in accordance with the applicable definition contained within*

*Penrith Local Environmental Plan 2010 being self-contained accommodation to tourists and visitors on a commercial basis."*

*Prior to the issue of an Occupation Certificate, the above restriction/positive covenant must be registered with Land Registry Services and evidence of registration provided to the Certifying Authority and Penrith City Council.*

As the time pressures relating to the delivery of the building were intense, Astina executed this condition, and a restriction is now on the title and is attached to this application. I note Penrith City Council is the Authority to vary this restriction.

## **2. Current Situation**

It is important to note the overarching objective for Penrith City Council in this transaction was to ensure the outcome of serviced apartments being delivered on the site. Despite serviced apartments forming a significant segment of Astina's total operations at that time, there seemed to be some concern over this being delivered and so additional assurance was sought by Council to guarantee that outcome. The Deed was proposed as the method to ensure that outcome.

As a result of the Council objective, and as a consequence of the previous modification issued by Council, there are currently three mechanisms relating to the development restricting its use.

1. Firstly, the Deed associated with the property negotiation.
2. Secondly, the actual consent which describes the development for which approval has been granted.
3. And thirdly, the conditions within the consent, being conditions 12 and 86.

In my opinion, the first and second mechanisms satisfactorily deliver the objective of Council.

For the first mechanism there is a financial penalty within a timeframe, after which it is acknowledged no reasonable control could be further placed on the site. Until the onset of the Covid 19 pandemic, the serviced apartments have been a success, operating at a high occupancy rate which reflects the general demand for quality accommodation within the Penrith CBD that continues to be undersupplied. I also note the Deed would have been resolved by Council itself, therefore representing the basis on which Council was satisfied to proceed with the transaction.

The second mechanism is quite straightforward. Council has issued a consent for serviced apartments. Were the use of the site to change, it would require a further development application to be lodged and consent granted. There is no desire for Astina to change the use of the building – it operates a successful serviced apartment business.

In my opinion the third mechanism, the restriction on title, is unnecessary and always represented an over-reach of the planning approvals process.

The Council's main concern was, from my recollection, selling its land and ensuring it was used for the purpose it was being sold for. Appropriately, a reasonable mechanism was included in the Deed associated with the sale of the land and again, this was acceptable to Council presumably by way of resolution. To control property development outcomes within the consent could be seen as a blurring of the two aspects to this development and is, in my opinion, unreasonable.

I have reviewed DA16/0357, which was for serviced apartments at 15 Engineers Place, Penrith and note that consent contains no such restriction on the title. Indeed, it reads that the Council's planners were of the view that the consent itself (mechanism 2 as I described above) would suffice. No restriction was placed on the title of that land as far as I can see by way of the recommended conditions.

Despite the success of Astina since opening, their financier has approached them with the intent of minimising their exposure to risk because of the Covid pandemic. Like me, they too have identified condition 86 as being overly onerous and have requested its removal.

From the perspective of Council's planning staff, the removal of condition 86 and the restriction from the land should not be a concern. Condition 12 would remain, on a consent for serviced apartments, with any changes requiring the lodgement of a separate application.

From the perspective of Council's property staff, the conditions in the Deed represent the acceptable outcomes to Council, noting Council itself would have resolved to include that Deed.

Condition 86 is unnecessary and unreasonable in the circumstances of this case and is therefore requested to be deleted.

### **3. Proposed Modification**

This application seeks consent to remove condition 86 and, in turn, the associated restriction on the title.

### **4. Required Amendments to Consent**

Deletion of condition 86, and authority from Penrith City Council to remove the restriction on the title.

### **5. Section 4.55 - Modification of Consents Generally**

Section 4.55 of the Act provides that a consent authority may, in certain circumstances, grant consent to an application that seeks to modify a development consent. In this circumstance, the minor nature of the amendment and the minimal impacts that arise as a result, warrant the application being requested under 4.55(1A) as follows.

(1A) Modifications involving minimal environmental impact

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:

- (a) it is satisfied that the proposed modification is of minimal environmental impact, and
- (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent originally granted was modified (if at all), and
- (c) it has notified the application in accordance with:
  - (i) the regulations, if the regulations so require, or
  - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
- (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1), (2) and (5) do not apply to such a modification.

Each of the matters listed above are dealt with in turn:

- a) The proposed plan amendments will not result in any negative environmental impact. No works are proposed that would impact any amenity consideration.
- b) The development would be substantially the same. Its use and building form are consistent with the original application. The development will continue to be consistent with what was described and approved in the original application.
- c) In our opinion the proposed amendment is so minor that we believe notification is not required in this instance.

Based on the discussion above the development proposal is appropriately defined as being of minimal environmental impact and is substantially the same development which enables Penrith City Council to determine the application in its current form.

## 6. Section 4.15 - Evaluation – Statement of Environmental Effects

Section 4.15 of the Environmental Planning and Assessment Act 1979 contains matters that need to be considered for any development application. Section 4.15 reads:

Matters for consideration—general

In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:

- (a) the provisions of:
  - (i) any environmental planning instrument, and
  - (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Director-General has notified the consent authority that the making of the proposed instrument has been deferred indefinitely
- or
- has not been approved), and

- (iii) any development control plan, and
  - (iia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
  - (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
  - (v) any coastal zone management plan (within the meaning of the Coastal Protection Act 1979), that apply to the land to which the development application relates,
- (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
- (c) the suitability of the site for the development,
- (d) any submissions made in accordance with this Act or the regulations,
- (e) the public interest.

The development will continue to satisfy the consideration against Section 4.15 even after the amendment as:

- a) The amendment does not affect the proposal's compliance with Council's LEP.
- b) There are no Draft EPI's relating to the land that are relevant to this proposal.
- c) There are no planning agreements that apply to the land that directly impact this modification.
- d) There will be no change in any potential impacts arising as a result of the proposed amendment to the development.
- e) The site will continue to be suitable for the approved use after the amendments are made.
- f) The public interest will not be diminished as a result of this application.

## **7. Summary**

The amendments are considered minor in nature with no impact arising in relation to how the site will function or potentially impact on the locality. Council can therefore support the application in its current form.

Please contact me on 0401 449 101 if you would like any further information.

Sincerely

**Stimson Urban & Regional Planning**

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Director

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